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No. 88-828

In the Supreme Court of the United States

OCTOBER TERM, 1988

MARIO BIAGGI AND MEADE ESPOSITO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred by using the "clearly erroneous" standard to review the district court's findings of fact concerning the reasons for the prosecutor's exercise of his peremptory challenges.

2. Whether petitioner Biaggi, a United States congressman, committed an "official act" within the meaning of 18 U.S.C. 201(a)(3) when he tried to persuade state and federal officals to aid a financially troubled constituent.

3. Whether Biaggi's conviction under the Travel Act, 18 U.S.C. 1952, was obtained in violation of the Speech or Debate Clause of the Constitution.

4. Whether the offense of receiving or giving an unlawful gratuity under 18 U.S.C. 201(f) and (g) is a proper predicate offense under the Travel Act.

5. Whether the evidence was sufficient to convict Biaggi of obstruction of justice.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A40) is reported at 853 F.2d 89. The opinions of the district court (Pet. App. D1-D22, E1-10) are reported at 673 F. Supp. 96 and 674 F. Supp. 86.

JURISDICTION

The judgment of the court of appeals was entered on August 1, 1988. A petition for rehearing was denied on October 6, 1988. Pet. App. B1. The petition for a writ of certiorari was filed on November 18, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner Biaggi

was convicted of accepting free vacations for official acts (18 U.S.C. 201(g) (1982)),[1] using interstate facilities with the intent to carry on an unlawful activity (18 U.S.C. 1952), and obstructing justice (18 U.S.C. 1503). He was sentenced to two and one-half years' imprisonment and was fined $500,000. Petitioner Esposito was convicted of giving Biaggi free vacations for Biaggi's official acts (18 U.S.C. 201(f) (1982)), and using interstate facilities with the intent to carry on an unlawful activity (18 U.S.C. 1952). Esposito was sentenced to two years' probation and was fined $500,000. Pet. App. A3.

1. During the time period at issue in this case, petitioner Biaggi was a representative from New York's 19th Congressional District. Petitioner Esposito was a principal in Serres, Visone and Rice, Inc. (SVR), an insurance brokerage firm that did business in Biaggi's district. Esposito was also a director of Beaumont Offset Corporation (Beaumont), a printing company. Coastal Dry Dock and Repair Corporation (Coastal) was a major client of SVR. Coastal, which refurbished ships for the United States Navy, generally paid SVR more than $200,000 per year in insurance commissions. Pet. App. A4-A5.

In the early 1980s, Coastal lost business and had trouble paying the rent and utility bills it owed to the Brooklyn Navy Yard Development Corporation (BNYDC). By early 1983, Coastal was about one-half million dollars behind in its payments to BNYDC. In March 1983, Esposito met with the chairman of BNYDC and the deputy mayor of New York City to express concern about Coastal's situation. Pet. App. A5-A6.

In March 1984, Esposito provided Biaggi with a round-trip airline ticket and a four-day vacation at a villa owned

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[1] The current versions of Section 201(f) and (g) are codified at 18 U.S.C. 201(c)(1)(A) and (B) (Supp. IV 1986).

by Beaumont on the island of St. Maarten in the Caribbean. Esposito and his partners in SVR also went on that trip. On May 9, 1984, a Coastal executive wrote Biaggi to urge that he assist Coastal in its dispute with BNYDC. Biaggi then wrote to New York City Mayor Edward Koch and called the deputy mayor to express his concern over Coastal's problems. Biaggi's letter, which was written on official House of Representatives stationery, asked the City to reach an accommodation with Coastal. Biaggi wrote a second letter on the stationery of the House Committee on Merchant Marine and Fisheries, in which he stated that he was "eager to be of any assistance in dealing with the Navy." Pet. App. A6. Biaggi also suggested that his presence or the presence of a member of his staff during meetings between the Navy and the City "might be helpful in demonstrating Congressional interest." *Ibid.* Nevertheless, Coastal's problems persisted and, in October 1984, SVR lent Coastal $110,000 to pay overdue insurance premiums. *Id.* at A7.

At the end of 1984, Biaggi and his girl friend vacationed at the Bonaventure Spa, a health resort near Ft. Lauderdale, Florida. The spa required Biaggi to be sponsored by a member. Accordingly, Biaggi arranged through Esposito to be sponsored by James LaRossa, an attorney who represented Esposito and Beaumont. Biaggi's bill of $3,228 was charged to LaRossa's account. LaRossa's firm paid the bill and was then reimbursed by Beaumont. Pet. App. A7.

In July 1985, New York City's deputy mayor warned Coastal that she would "shut off" its lights unless it began to pay its rent and utility bills. A few days later, Biaggi called her to express his concern about Coastal's situation. In September, Biaggi called her again, repeated his concern, and urged the City to help Coastal. In November

1985, Coastal cancelled substantial amounts of insurance it had previously purchased through SVR. Esposito met with Biaggi and a Coastal executive in an effort to solve Coastal's problems. Biaggi then telephoned United States Senator Alphonse D'Amato and told him that Coastal was being treated unfairly. Pet. App. A7-A8.

On December 2, 1985, Biaggi met with Esposito and Coastal's chairman. The next day, Biaggi attended a meeting with Senator D'Amato, during which the Senator tried to call the Secretary of the Navy. During the following weeks, Biaggi frequently talked with Senator D'Amato to encourage him to lobby New York City's deputy mayor and to ask about any progress with the Secretary of the Navy. Pet. App. A8.

On December 17, 1985, Biaggi telephoned Esposito and asked him to make arrangements for Biaggi and his girl friend to spend their Christmas vacation at the Bonaventure Spa. After discussing the details of the vacation, Biaggi told Esposito that he had been working very hard for Coastal and that "we've been getting them money." Pet. App. A8. Esposito replied, "Okay. That's all I want to know." *Ibid.* Esposito made arrangements with attorney LaRossa for Biaggi and his girl friend to stay at the spa and for the bill to be paid by Beaumont. Esposito called Coastal's Chairman and told him that "Mario's doin[g] his best." *Id.* at A9. Later that day, Biaggi again called Senator D'Amato and the City's deputy mayor. *Id.* at A8-A9.

On December 19, 1985, Esposito informed Biaggi that the arrangements for the spa vacation had been made. On December 20, Esposito told one of his SVR partners that Biaggi was going to be a guest at the spa, that he had made

similar arrangements the year before, and that "that's good money invested." Pet. App. A9.

After Biaggi returned from his second Florida vacation, he continued to help Coastal. He told Esposito that he planned to introduce a bill in Congress for the Navy to spend $800 million on smaller craft, which would enable Coastal to do more business. Biaggi met with Senator D'Amato and Coastal's chairman to prepare the Senator for a meeting with the Secretary of the Navy. And he called the Commandant of the Coast Guard in an attempt to get more work for Coastal. Biaggi continued his efforts until May 1986, when Coastal went bankrupt. Pet. App. A9.

On February 13, 1986, a federal grand jury in the Eastern District of New York began to investigate Biaggi's and Esposito's activities on behalf of Coastal. Pet. App. A34. On June 2, 1986, FBI agents interviewed Biaggi concerning his relationship with Esposito and his actions on Coastal's behalf. Minutes after the interview concluded, Biaggi telephoned Esposito and informed him that he had just been questioned by the FBI. Biaggi directed Esposito to take the following positions: that Esposito had arranged the vacations because he was concerned about Biaggi's health, not because Biaggi was a member of Congress, and that Esposito first approached Biaggi about Coastal only four or five months earlier. Biaggi also told Esposito that he should not mentioned the trip to St. Maarten. Pet. App. A10.

2. At petitioners' trial, the government used its first five peremptory challenges to exclude veniremen whose last names ended in vowels. The government later used two peremptory challenges to exclude two alternate jurors whose last names ended in vowels. At the close of the voir

dire, petitioners moved to dismiss the jurors on the ground that the government had deliberately excluded Italian-Americans from the jury. The district court took that motion under advisement until after the trial. Pet. App. A13-A14.

After the trial, the court determined that two of the selected jurors were Italian-Americans and that four other jurors were related in some way to persons of Italian ancestry. Pet. App. D3. The government then submitted an affidavit setting forth the lead prosecutor's reasons for his peremptory challenges. *Id.* at D5. The court held an evidentiary hearing at which the two prosecutors who had participated in the voir dire testified. *Id.* at D4. After the hearing, the district court ruled that Italian-Americans are a cognizable "racial" group within the meaning of *Batson* v. *Kentucky*, 476 U.S. 79 (1986), and that the government's pattern of peremptory challenges raised an inference of discrimination against Italian-Americans. Pet. App. D6-D12. But the court found that the prosecutor's explanations for his challenges were "credible, neutral, and legitimate." *Id.* at D16. Thus, after examining each of the government's peremptory challenges, the court found that the government did not engage in purposeful discrimination. Indeed, the court declared that the jury was "an excellent cross-section of the Eastern District of New York by ethnic background, race, sex, education, age[], experience and geography." *Id.* at D19.

3. The court of appeals affirmed. Pet. App. A1-A40. It upheld the district court's finding that the prosecutors had not used their peremptory challenges to discriminate against Italian-American jurors. The court of appeals held that the "district court's findings as to the explanations offered by the government are not clearly erroneous." *Id.* at A15.

The court of appeals also concluded that Biaggi's efforts on behalf of Coastal were "official acts" within the meaning of 18 U.S.C. 201. The court observed that a congressman's job includes dealing with public agencies on behalf of his constitutents, and that Biaggi did just that on behalf of Coastal. Pet. App. A17-A25.

The court further held that Biaggi's conviction for violating 18 U.S.C. 201 was a proper predicate for a violation of the Travel Act, 18 U.S.C. 1952. The Travel Act makes it illegal to travel in interstate commerce or to use any facility of interstate commerce in connection with committing "bribery." 18 U.S.C. 1952(b)(2)). After examining the legislative history of the Travel Act, the court held that Biaggi's violation of 18 U.S.C. 201(c) was a "bribery" offense within the meaning of the Travel Act. Pet. App. A25-A28.

The court of appeals also held that Biaggi's prosecution under the Travel Act did not violate the Speech or Debate Clause of the Constitution. The court rejected Biaggi's claim "that his speech-or-debate immunity was invaded by the very fact that his legislative activities in Florida were brought to the jury's attention." Pet. App. A30. The court noted that any legislative purpose of Biaggi's Florida trips "was first mentioned by Biaggi's aide in a volunteered statement when no question from the government was pending." *Id.* at A32. The court concluded that "the subsequent questioning of [Biaggi's aide] with regard to that activity and the government's efforts to minimize the role of that activity as an impetus for the Florida trips provide no basis for reversal." *Ibid.*

The court next rejected Biaggi's contention that the evidence was insufficient to support his conviction for obstruction of justice. The court stated that the evidence supported the jury's finding that a federal grand jury in-

vestigation was pending at the time Biaggi called Esposito and sought to have Esposito impede the investigation. Pet. App. A33-A36.

ARGUMENT

1. Petitioners first contend (Pet. 8-9) that the court of appeals erred by not making specific findings concerning the prosecutors' explanations for their use of peremptory challenges. They maintain that *Batson* v. *Kentucky, supra*, requires such fact-finding by the court of appeals. In *Batson*, this Court held that a prosecutor violates the Equal Protection Clause if he uses peremptory challenges to strike veniremen on the basis of their race. The Court also set forth procedures to implement that holding. The defendant must first make a prima facie case of discrimination in the prosecutor's use of peremptory challenges. 476 U.S. at 94. If the defendant satisfies that burden, the burden shifts to the prosecutor to come forward with a neutral explanation for the use of his challenges. *Id.* at 97. The trial court then must make a finding whether the prosecutor intentionally discriminated on the basis of race. *Id.* at 98. Courts of appeals are instructed to give "great deference" to the findings of the district court on that issue. *Id.* at 98 n.21.

The courts below followed that procedure. The district court conducted an extensive inquiry into petitioners' claim of unlawful discrimination. In rejecting petitioners' claim, the district court made specific findings of fact with respect to the prosecutor's explanation for each one of his strikes. See Pet. App. D16-D19. The court of appeals, applying the "clearly erroneous" test, upheld the district court's findings. This Court's decision in *Batson* requires no more.

Although petitioners make a general claim that the court of appeals was unjustified in upholding the district court's findings, the district court's detailed analysis of the prosecutor's reasons for exercising each peremptory challenge provided a firm basis for the appellate court's ruling. Petitioners specifically attack (Pet. 9) the prosecutor's decision to challenge Angela DiSanto. The district court, however, found that the prosecutor had sound, good faith reasons for challenging DiSanto as well as each of the other six jurors struck by the government. With respect to juror DiSanto, the court found that the government struck her because she was an active member of organizations of which Biaggi "was probably a leading officer or by which he had probably been honored" (Pet. App. D18).

The court found that the government challenged two of the jurors, Frank Lauvicano and Dorothy Delbano, because their demeanor and attire suggested that they were not sufficiently serious about jury work (Pet. App. D17, D18). The court found that other jurors were also challenged for valid reasons, including apparent hostility to the prosecution and employment that might have made them biased in favor of petitioners. Juror Joseph Angerome, the court found, was challenged for a variety of reasons: he was unusually angry at the mispronunciation of his name; he had voted for Biaggi; and he had worked for the Postal Service. The prosecutors believed that last factor could result in bias in favor of Biaggi because Biaggi had been a postal worker, because Biaggi advocated civil servants' causes, and because the prosecutors thought Postal Service employees might regard the gifts received by Biaggi as insignificant since Postal Service employees often accept small Christmas gifts from postal patrons (Pet. App. D16-D17). Juror Patricia Randazzo was struck because of her angry reaction to the

prosecutor's request that the court ask her additional questions at the side bar, and because her husband had been a member of the police department at the same time as Biaggi, who enjoyed wide reknown as a police officer and who had been an executive officer in the Policemen's Benevolent Association (*id.* at D17). Similarly, juror Louis Divito was struck because he was employed by the New York City Department of Sanitation, with which both defendants had close ties (*id.* at D18). And juror Andrew Baccarella was struck because his wife worked for a printing company on Long Island and could have been influenced by Esposito's close connection to that industry (*id.* at D17). Petitioners therefore are quite wrong in suggesting that the lower courts failed to conduct an adequate inquiry into the prosecutor's reasons for his peremptory challenges and failed to make adequate findings as to whether those challenges were based on permissible considerations.[2]

2. Petitioners next contend (Pet. 10-12) that Biaggi's conduct on behalf of Coastal did not fall within the definition of an "official act" under 18 U.S.C. 201. Section 201(a)(3) defines an "official act" as a "decision or action on any question [or] matter * * * which may by law be

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[2] This Court granted certiorari in *Tompkins* v. *Texas*, No. 87-6405 (May 16, 1988), to determine whether an appellate court may defer to the district court's acceptance of the prosecutor's explanations even though the court of appeals found those explanations to be implausible on their face. The petitioner in *Tompkins* has argued (87-6405 Pet. 20) that the Texas Court of Criminal Appeals failed to apply the clearly erroneous standard that ordinarily applies to findings of fact. In this case, by contrast, the prosecutor's explanations for his challenges are plausible, the district court made specific findings regarding the non-discriminatory nature of those reasons, and the court of appeals correctly held that the district court's findings were not clearly erroneous. Thus, there is no reason to hold this petition pending the Court's decision in *Tompkins*.

brought before any public official, in his official capacity, or in his place of trust or profit." Petitioners argue that Biaggi "had no decision-making responsibility with regard to any of the issues which arose out of the dispute between Coastal and New York City" (Pet. 11). The premise for that argument is the contention that a congressman's official acts are limited to those acts that directly relate to enacting laws. There is no merit to that claim.

In *United States* v. *Birdsall*, 233 U.S. 223 (1914), this Court construed the statutory predecessor to Section 201 and stated that official acts include "duties * * * established by settled practice" (*id.* at 231). Since *Birdsall*, this Court has recognized that a congressman's duties include more than direct legislative acts. Official acts also include a congressman's actions taken on behalf of constituents, such as the making of appointments with government agencies and assistance in securing government contracts. See *United States* v. *Brewster*, 408 U.S. 501, 512 (1972). Such acts fall within Section 201's phrase—"any decision or action * * * on any question [or] matter * * * which may by law be brought before any public official."

The evidence at trial showed (Pet. App. A19) that Biaggi's efforts on behalf of Coastal were the types of services that congressmen commonly perform for their constituents. Biaggi used his position as a congressman to assist Coastal by writing letters on official stationery, assigning the Coastal matter to the top manager in his congressional office, telling the Mayor of New York that his presence at meetings would show congressional support of Coastal, and stating that he would introduce legislation to favor Coastal.

Petitioners maintain (Pet. 11) that Biaggi's conduct fell outside Section 201 because he dealt solely with local

officials. The evidence showed, however, that Biaggi dealt not only with New York City officials but also with federal officials, including a United States Senator and the Commandant of the Coast Guard. In any event, Section 201 covers "any" action taken on a matter that is brought before the public official whether that public official's actions are directed toward federal, state, or local agencies. Thus, as long as the matter brought before the public official is brought before him in his official capacity, it does not matter whether his actions are directed at other federal officials, other governmental officials, or even private parties.[3]

3. Biaggi further contends (Pet. 12-13) that his conviction on the Travel Act count was obtained in violation of the Speech or Debate Clause of the Constitution (Art. I, § 6, Cl. 1). At trial, Robert Blancato, Biaggi's administrative assistant, testified as a government witness. He testified that the House Committee on Aging had paid Biaggi's air fare to Florida during late 1984 and late 1985. Blancato then volunteered that Biaggi's trip to Florida in

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[3] Contrary to petitioners' contention (Pet. 10-12), the decision below does not conflict with *United States* v. *Muntain*, 610 F.2d 964 (D.C. Cir. 1979). In that case, an official at the Department of Housing and Urban Department was convicted of receiving unlawful gratuities in violation of Section 201. The evidence showed that the defendant was involved in a private scheme to sell group automobile insurance to labor unions at the same time that he was working in the Department. The court of appeals reversed the defendant's conviction on the ground that his conduct did not constitute an "official act" within the meaning of Section 201(a)(3), because HUD had no responsibility with regard to the promotion of group automobile insurance for labor unions. The basis for the court's ruling in *Muntain*—that automobile insurance was not within the defendant's responsibility as a HUD official—does not in any way conflict with the holding of the court of appeals in this case—that Biaggi's services on behalf of Coastal were within his responsibilities as a congressman.

1984 was made in connection with a fact-finding mission to inspect a local agency on aging and that the purpose of his Florida trip in 1985 was to visit a health maintenance organization in connection with an upcoming legislative hearing. The prosecutor then questioned Blancato about Biaggi's reasons for traveling to Florida to rebut the inference that he traveled on congressional business and not in connection with an illegal-payment scheme. Pet. App. A31-A32.

Biaggi maintains that the government improperly elicited evidence concerning the legislative purpose of his travel to Florida. But the government's case against Biaggi did not in any way depend on evidence showing that Biaggi traveled to Florida to engage in matters protected by the Speech or Debate Clause. Rather, the prosecution's case rested on evidence showing that Biaggi traveled to Florida for a vacation that was partially funded by Esposito. A congressman's travel as a part of a scheme to accept an illegal payment is not protected by the Speech or Debate Clause. See generally *United States* v. *Brewster, supra* (prosecution of a United States Senator for taking a bribe under Section 201 does not violate the Speech or Debate Clause). The fact that Biaggi may have had dual motives in traveling to Florida is legally irrelevant. See *United States* v. *Walsh*, 700 F.2d 846, 854 (2d Cir.), cert. denied, 464 U.S. 825 (1983); *United States* v. *Peskin*, 527 F.2d 71, 75 (7th Cir. 1975) ("section 1952 does not require that defendant's travel be solely in pursuit of criminal activity"), cert. denied, 429 U.S. 818 (1976). This is therefore not a case in which a Member of Congress has been questioned regarding the performance of his legislative duties, but precisely the opposite—a case in which the government's evidence showed that Biaggi's activities in Florida consisted, for the most part, of a vacation and not legislative activities.

4. Petitioners next contend (Pet. 13-14) that making or receiving an illegal payment under 18 U.S.C. 201(f) and (g) cannot serve as a predicate offense for a violation of the Travel Act. The Travel Act, 18 U.S.C. 1952, makes it a crime to travel in interstate commerce with the intent to "promote, manage, establish, carry on, or facilitate * * * any unlawful activity." The Travel Act then defines "unlawful activity" to include "bribery * * * in violation of the law of the State in which committed or of the United States." In *Perrin* v. *United States*, 444 U.S. 37, 43 (1979), this Court noted that the term "bribery" had a narrow meaning at common law—*i.e.*, the corruption of a public official. But by 1961, when the Travel Act was passed, the legal term "bribery" had extended "well beyond its common-law meaning" (*id.* at 43). Thus, the Court in *Perrin* held that the Congress that passed the Travel Act adopted a "generic definition of bribery, rather than a narrow common-law definition" (*id.* at 49).

Petitioners violated 18 U.S.C. 201(f) and (g) by making and receiving payments for the performance of official duties. Those offenses fall within the "generic definition of bribery." Indeed, Congress titled Section 201 "Bribery of public officials and witnesses." Thus, the plain language of the statute demonstrates that 18 U.S.C. 201(f) and (g) set forth "bribery" offenses within the meaning of the Travel Act. Petitioners cite no authority for their claim that violations of 18 U.S.C. 201(f) and (g) may not serve as predicate offenses under 18 U.S.C. 1952.[4]

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[4] Petitioners' reliance (Pet. 14) on a statement of Senator McCulloch is misplaced. Senator McCulloch stated his view that the Travel Act has a specific-intent element; that is, the travel or use of interstate facilities must be done with the specific intent to promote an unlawful activity. He did not comment on the type of intent required for the underlying predicate offenses, such as gambling, extortion, bribery, and arson.

5. Finally, Biaggi contends (Pet. 15-16) that the evidence was insufficient to support his conviction for obstruction of justice because the government did not prove that a grand jury was investigating his affairs on June 2, 1986, when he directed Esposito to lie to the investigators. Biaggi's fact-specific claim is without merit.

Biaggi stipulated at trial that on February 13, 1986, a grand jury had begun an investigation into Biaggi's efforts to assist Coastal in exchange for unlawful gratuities. Pet. App. A34. That stipulation by itself was sufficient evidence of a pending grand jury investigation. Moreover, the evidence showed that, on June 1, 1986, agents of the FBI met with one of the prosecutors to coordinate the service of 70 grand jury subpoenas. And Biaggi's girl friend was served with a grand jury subpoena at about the same time that the agents interviewed Biaggi on June 2. *Ibid.* Hence, the court of appeals correctly held that there was sufficient evidence of a pending grand jury investigation on June 2, 1986. See generally *United States* v. *McComb*, 744 F.2d 555, 560-561 (7th Cir. 1984) (grand jury investigation was pending where subpoenas had been issued); *United States* v. *Vesich*, 724 F.2d 451 (5th Cir. 1984) (grand jury investigation was pending where government had, among other things, notified witness that he was to testify before the grand jury).[5]

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[5] Biaggi does not challenge the jury's finding that he knew of the pending grand jury investigation when he directed Esposito to lie about their relationship and the reason for Esposito's gifts.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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